PRIVY COUNCIL REPORT

CITY INVESTMENT SDN. BHD. v. KOPERASI SERBAGUNA CUEPACS TANGGUNGAN BHD.

[P.C. (Lord Keith of Kinkel, Lord Fraser of Tulleybelton, Lord Templeman, Lord Ackner & Sir Robert Megarry) November 2 & 24, 1987]

[Privy Council Appeal No. 43 of 1985]

Contract – Housing development contract – Sale of building lots – Breach of contract – Specific performance – Damages – Remoteness – Specific performance of part of contract – Housing Developers Rules 1970, r.12 – Housing Development (Control and Licensing) Act 1966 – Specific Relief Act 1950, ss. 3, 11, 14 & 18.

Land Law – Sale of immovable property – Breach of contract – Specific performance.

Land Law – Housing Developers – Breach of contract – Specific performance – Damages – Indemnity for failure to complete housing development in time – Housing Developers Rules 1970, r.12 – Housing Development (Control and Licensing) Act 1966.

In this case, the appellants were the registered owners of land. They entered into two separate contracts with the respondents for the sale of a portion of the land to be developed. By the first contract, the appellants agreed to sell to the respondents 60 specified building lots for the price of $5,000 for each lot and to clear and level the lots for a development price of $420,000 calculated at the rate of $7,000 for each lot. The appellants also agreed to nominate a licensed housing developer who would build a terrace house on each lot in conformity with the plans and specifications annexed to the first contract for the construction price of $840,000 calculated at the rate of $14,000 for each house. Following the first contract, the respondents entered into individual contracts with members of the society whereby each member became entitled and bound to acquire one of the lots and the terrace house to be erected thereon in accordance with the terms of the first contract. The respondents have paid the sum of $720,000 to the appellants consisting of $300,000 as land price and $420,00 as development price.

By the second contract, the appellants agreed to sell to the respondents specified land and to obtain 25 separate titles to the land divided into lots for the erection of 14 semi-detached houses and 11 bungalows. The respondents have paid the sum of $426,300 for these lots comprising of $172,000 as land price and $254,300 as development price.

Out of the 85 lots sold, the appellants have transferred to the respondents only one terrace lot under the first contract and one semi-detached lot under the second contract. Ten of the bungalow lots under the second contract were found to be commercially useless as it would cost about $13 million to level the land.

The appellants had nominated themselves as the licensed housing developer for the first contract and submitted a draft building contract which was rejected by the respondents as it did not conform with the provisions of the Housing Developers (Control and Licensing) Act 1966 and the rules made thereunder.

The learned trial judge held that the first contract was a sale of land with houses and therefore caught by housing developers legislation. He found that the appellants were in breach of both the contracts for their failure to transfer the various lots to the respondents. In respect of the first contract, he ordered specified performance for the transfer of the remaining 59 terrace-lots to the respondents and he also awarded compensation for consequential loss which included, *inter alia*, damages for additional costs in constructing the 60 terrace houses and $187,200 as indemnity under the Housing Developers Rules 1970. In regard to the second agreement, he ordered specific performance for the transfer of the remaining 13 semi-detached lots and one bungalow lot. For the ten useless bungalow lots, the appellants were ordered to refund the contract price of $203,000 with interest. In addition to specific performance, the learned judge also ordered damages for increased cost of construction – $117,000 for the 9 semi-detached houses and $148,500 for the 11 bungalows.

The appellants appealed to the Federal Court but the appeal was dismissed – see [1985] 1 M.L.J. 285. The appellants appealed from the decision of the Federal Court.

Held, dismissing the appeal: (1) by the first contract and by the appellant's own nomination of themselves as developers, the appellants became engaged in the business of housing development by agreeing to construct more than four units of housing accommodation in one development with the view of selling the housing accommodation thus constructed. By the first contract and the appellant's own nomination of themselves as developers too, the appellants sold the sites of the terrace houses for the land purchase price, agreed to level and clear the sites for the development price and agreed to construct the terrace house with a view of selling them to the respondents for the construction price;

(2) rule 11 of the Housing Developers (Control and Licensing) Rules 1970 makes provision for the possibility that the land may be vested in a proprietor who is not the developer and in that case the rules relating to the terms and conditions of a contract of sale are to apply so far as appropriate to both the proprietor and the developer. In the present case, the appellants were and remain the proprietors of the land until they transfer the building lots. Under the first contract and the nomination, the appellants became the housing developers under a contract to construct and sell 60 terrace houses to the respondents for the construction price;

(3) in this case, there was a separate price and a separate completion date for the sale of the land. By refusing to build the houses for the construction price, the appellants cannot deprive the respondents of the land for which the respondents have already paid in full the land purchase price and the development; section 15 of the Specific Relief Act makes provision for specific performance in circumstances which obtain in this case;

(4) under the first contract, it was the duty of the appellants to obtain a licence and to obtain approval of the building plans. The court may refuse to order specific

performance of an agreement to build or of an obligation to obtain a licence or to obtain approval for plans, but that is no reason why the court should not award damages for breach of contract;

(5) in this case, there has been delay in the delivery of the vacant possession of the housing accommodation and the appellants must pay for that delay under the Rules just as they would have to pay under common law rules. The learned judge was right in awarding damages for the delay occasioned by the appellant's default;

(6) the learned judge was also right in awarding damages for the difference between the construction price and the cost to the respondents of employing another builder to carry out the development at the date of the trial of the action. The Act of 1966 and the Rules were designed to improve and supplement common law remedies and do not expressly or by implication deprive a litigant of a contractual remedy which is not dealt with under the Rules;

(7) in regard to the second contract, the learned judge was correct in making an order for specific performance in respect of the lot that was unaffected by problems of terrain. In respect of the other bungalow lots, as they were in fact practically and commercially useless for the the purpose for which they were bought, the trial judge was correct in awarding damages in lieu of specific performance;

(8) the learned judge was correct in awarding damages in respect of all the 11 bungalow lots on the basis of the difference between the 1978 cost of building the bungalows and the cost of building the same bungalows at the date of the trial.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

D.R. Ratee Q.C. (*R.R. Sethu* and *P.P. Royan* with him) for the appellants.

George Newsman Q.C. (*Datin Saraswathy Devi Alagendra* with him) for the respondents.

Cur. Adv. Vult.

Lord Templeman (delivering the judgment of the Board): On September 30, 1980, the respondent co-operative society issued a writ in the High Court of Malaya at Seremban against the appellant company, City Investment, claiming specific performance, damages and other relief in respect of two contracts, both dated November 24, 1976. Since the issue of the writ, the appellants have persisted in complicated and unmeritorious defences, all of which were rejected by the trial judge Peh Swee Chin J. and on appeal by the Federal Court of Malaysia (Lee Hun Hoe C.J. (Borneo), Mohamed Azmi and Abdoolcader F.JJ.) in clear and comprehensive judgments. Their Lordships agree with the orders which have been made in favour of the co-operative society.

By the first contract, the appellants agreed to sell to the co-operative society 60 specified building lots for a land purchase price of $300,000, calculated at $5,000 for each lot, and to clear and level the lots for a development price of $420,000, calculated at the rate of $7,000 for each lot, and then to nominate a licensed housing developer who would build a terrace house on each lot in conformity with the plans and specifications annexed to the first contract for a construction price of $840,000 calculated at the rate of $14,000 for each house. The co-operative society agreed to enter into the requisite building contract with the developer nominated by the appellants. Following the first contract, the co-operative society entered into individiual contracts with members of the society whereby each member became entitled and bound to acquire one of the lots and the terrace house to be erected thereon in accordance with the terms of the first contract.

On April 12, 1978, the appellants nominated themselves as the licensed housing developer for the first contract and submitted a draft building contract which was rejected by the co-operative society. The appellants' first argument is that the co-operative society wrongly rejected the draft building contract and is therefore not entitled to the relief which they claim in respect of the first contract. The co-operative society argued that they were entitled to reject the draft building contract because it did not conform with the provisions of the first contract or the provisions of the Housing Developers (Control and Licensing) Act 1966 ("the Act of 1966") and the rules made thereunder.

By section 5(1) of the Act of 1966, "no housing development shall be engaged in, carried on or undertaken except by a housing developer in possession of a licence issued under this Act." By section 3 of the Act of 1966:

> " 'Housing development' means the business of developing or providing monies for developing or purchasing ... more than four units of housing accommodation which will be or are erected by such development; and for the purposes of this definition 'develop' means to construct or cause to be constructed, and includes the carrying on of any building operations for the purpose of constructing housing accommodation in, on, over or under any land with the view of selling the same or the land which would be appurtenant to such housing accommodation;"

The first contract recognized that the construction of 60 terrace houses was a "housing development" because by clause 2 the appellants agreed to:

> "... appoint a licensed housing developer ... for the construction of the proposed building in accordance with the provisions and requirements of the Housing Developers

(Control and Licensing) Act 1966 and the rules thereunder ..."

in consideration for the construction price. But by clauses 1 and 2 of the draft building contract submitted by the appellants to the co-operative society, the parties purported to agree and declare that:

"(1)... as the said plots have already been sold to the owner, the construction by the contractor of the said buildings does not bear the meaning of 'the business of development ... with a view to selling the same ...' within the definition of the phrase 'housing development' in section 3 of the Housing Developers (Control and Licensing) Act 1966 ... although the contractor will be constructing more than four units of housing accommodation, the contractor will not in this particular case be engaged in or carrying on or undertaking a housing development ... and is therefore not a housing developer ...

(2) clause (2) of the [first contract] was agreed to in error ..."

It is not surprising that the co-operative society rejected a draft building contract which appeared to flout the terms of the Act of 1966 and was inconsistent with the express provisions of the first contract. The appellants argue that the Act of 1966 does not apply where land is sold and is then developed. This argument makes nonsense of an Act which is clearly designed to protect purchasers from developers, and those purchasers need protection whether the sites of houses are sold before or contemporaneously with or after completion of the houses. By the first contract and by the appellants' own nomination of themselves as developers, the appellants became engaged in the business of housing development by agreeing to construct more than four units of housing accommodation in one development with the view of selling the housing accommodation thus constructed. By the first contract and the appellants' own nomination as developers, the appellants sold the sites of the terrace houses for the land purchase price, agreed to level and clear the sites for the development price and agreed to construct the terrace houses with a view of selling the same to the co-operative society for the construction price.

The next argument for the appellants is that, if the Act of 1966 applies, the rules made thereunder do not apply. The Housing Developers (Control and Licensing) Rules 1970 were made pursuant to section 24 of the Act of 1966. This enables regulations to be made for the purpose of carrying into effect the provisions of the Act, including the regulation of conditions and terms of any contract between a licensed housing developer and his purchaser. Rule 2 defines a "contract of sale" as meaning "a contract between a licensed housing developer and a purchaser for the sale and purchase of housing accommodation including the lands appurtenant to such housing accommodation". It is said that when a builder contracts to erect housing accommodation on land belonging to someone else for a fixed price the contract cannot properly be described as a contract of sale or as a contract for the sale and purchase of housing accommodation. But Rule 11 makes provision for the possibility that the land may be vested in a proprietor who is not the developer, and in that case the rules relating to the terms and conditions of a contract of sale are to apply so far as appropriate to both the proprietor and the developer. The concept of a building developer selling housing accommodation which he constructs and the concept of a builder entering into a contract for the sale and purchase of housing accommodation must therefore apply, so far as the builder is concerned, to a contract whereby he agrees to construct the housing accommodation and the other contracting party agrees to pay for that construction. In the present case, the appellants were and remain the proprietors of the land until they transfer the building lots. Under the first contract and the nomination, the appellants became the housing developers under a contract to construct and sell 60 terrace houses to the co-operative soceity for the construction price.

The appellants were in breach of their obligations under the first contract when they failed to transfer the lots to the co-operative society, when they submitted the draft building contract which was not in accordance with the terms of the first contract or the Act of 1966, and when they failed to proceed with the construction of the terrace houses. The courts below ordered specific performance of the first contract so far as it required the appellants to transfer the building lots to the co-operative society in consideration of the land purchase price and the development price. The courts declined to order specific performance of the building obligations contained in the first contract but awarded damages against the appellants for their breach of contract in failing to proceed with the construction of the terrace houses.

The appellants argue that the co-operative society is not entitled to specific performance of the contract to sell the land unless the co-operative society abandons their claim for damages. This argument is based on section 14 of the Specific Relief Act 1950 which provides that:

"14. Where a party to a contract is unable to perform the whole of his part of it ... the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant."

But section 15 of the Act makes provision for specific performance in circumstances which obtain in the present case:

"15. When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part."

It was argued that the agreement in the first contract to sell the land does not stand on a separate and independent footing from the agreement in the first contract to construct the terrace houses. But there was a separate price and a separate completion date for the sale of the land. By refusing to build the houses for the construction price, the appellants cannot deprive the co-operative society of the land for which the co-operative society has already paid in full the land purchase price and the development price.

It was faintly argued that the co-operative society is not entitled to specific performance because the appellants did not obtain a licence under the Act of 1966 and are not entitled to damages because the local authorities had not approved the building plans prior to the trial of the action. But under the first contract, it was the duty of the appellants to obtain a licence and to obtain approval of the building plans. The court may refuse to order specific performance of an agreement to build or of an obligation to obtain a licence or to obtain approval for plans, but that is no reason why the court should not award damages for breach of contract.

Next, the appellants argued that if specific performance and damages are the appropriate remedies, the trial judge erred in the computation of damages. The trial judge awarded damages for the delay occasioned by the appellants' default. The judge found that if the appellants had not committed breaches of contract, the terrace houses would have been completed by about December 11, 1979 and that by reason of the appellants' default there would be a further 18 months' delay incurred before a builder other than the appellants could have carried out the development. The judge awarded interest for this 18 months at 8% per annum on the purchase price of the land and houses. Rule 12(1)(r) of the Rules of 1970 requires a contract by a licensed housing developer to include a provision that:

"... he shall indemnify the purchaser for any delay in the delivery of the vacant possession of the housing accommodation. The amount of the indemnity shall be calculated from day to day at the rate of not less than 8% per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale."

The appellants argued that damages for delay under rule 12(1)(r) would only be payable if a developer did not complete a house in time, and would not be payable where, as in the present case, the developer failed to build a house at all. On this construction, rule 12(1)(r) would encourage a developer not to build instead of discouraging him from building slowly. There has been delay and the appellants must pay for that delay under the Rules just as they would have had to pay under common law rules.

The judge also awarded damages for the difference between the construction price and the cost to the co-operative society of employing another builder to carry out the development at the date of the trial of the action. The appellants submit that the co-operative society is not entitled under the Rules to damages for the increased cost of building. But the Act of 1966 and the Rules were designed to improve and supplement common law remedies and do not expressly or by implication deprive a litigant of a contractual remedy which is not dealt with under the Rules.

By the second contract dated November 24, 1976, the appellants agreed to sell to the co-operative society specified land and to obtain 25 separate titles to the land divided into lots for the erection of 14 semi-detached houses and 11 bungalows for a land purchase price which was payable and was paid by January 15, 1977. The appellants agreed to level and clear the lots for a development price which, after allowing for a deposit, amounted to $241,800 payable two months after the appellants gave notice that qualified titles to the 25 lots had been issued.

Clause 13 of the second contract provided that:

"(13) Upon the issue of the documents of qualified title in respect of each of the said plots and subject to the payment in full by the purchaser to the vendor of the land purchase price, the development price and all other monies

due to the vendor in accordance with the provisions of this agreement and subject further to the purchaser's performance and observance of the terms and conditions herein provided, the vendor shall execute a valid and registrable transfer to the purchaser of his nominee or lawful assignee as the case may be, of the said plots free from all encumbrances ..."

By a letter dated June 9, 1978, the appellants gave notice that qualified titles to the 25 lots had been issued and further gave notice that pursuant to the second contract, $241,800 were required to be paid by the co-operative society within two months commencing on the date of the receipt by the co-operative society of that notice. Payment was duly made and acknowledged on August 9, 1978. And on March 12, 1979, the co-operative society wrote to the appellants asking for the 25 lots to be transferred. By a letter dated March 23, 1979 acknowledging the demand for transfers, the appellants' solicitors cryptically referred the co-operative society "to their breach of clause (9) of the agreement dated November 24, 1976". Clause 9, so far as material, provided that:

"If the position measurements boundaries and or area of the said plots as shown or indicated on the layout plan or herein shall be different from its position measurements boundaries and or area as stated or shown on the separate documents of qualified title when issued ... the land purchase price shall be adjusted equitably. For the purpose of adjustment, the price of the said plots shall be calculated at the price per square foot specified in section (8) of the First Schedule hereto and any payment resulting from the adjustment and requiring to be paid by the party concerned shall be so paid within two months of the issue of the documents of qualified title."

The appellants, who had received the qualified titles and had demanded and received the original purchase price, never made any other demand.

The trial judge found that an adjustment to the land purchase price might be required. Out of 13 semi-detached lots "three of them would appear to have a smaller area than that sold and the last four would appear to have excess land. The excess or deficit would appear to range between 500 square feet to 2,393 square feet and in terms of payment, therefor, between $1,305 to $6,939.70".

The appellants contended that they were not in breach of contract by refusing to transfer any of the lots because under clause 9 there might be some additional sum payable to them by the co-operative society. But the appellants had received all that they had ever demanded, they had never calculated or required payment of any excess and they failed to prove that there was in fact any excess. The argument based on clause 9 of the second contract is an insubstantial excuse. The judge was fully justified in awarding specific performance of the second contract and in awarding, as damages for the delay in the transfer of the lots, interest on the purchase price and the increased cost of development which, as the appellants well knew, the co-operative society intended to commission as soon as the lots were transferred to them.

For the 11 bungalow lots, an order for specific performance was made in respect of the only lot that was unaffected by the problems of terrain. No such order was made for the other two bungalow lots, for the trial judge found that these lots "were in fact practically and commercially useless for the purpose for which they were bought" unless some $13 million was spent on constructing a retaining wall for the purpose of levelling the lots. By clause 28 of the second contract, the appellants covenanted "that the said plots shall be flat enough to erect a building thereon". The trial judge therefore awarded damages in lieu of specific performance so far as the ten bungalow lots were concerned.

In respect of all 11 bungalow lots, damages were also awarded on the basis of the difference between the 1978 cost of building the bungalows and the cost of building the same bungalows at the date of the trial. The appellants contended that these damages were too remote. But the appellants well knew that the co-operative society required the lots in order to provide housing accommodation for their members and that if the appellants failed in breach of contract to transfer building lots in accordance with the terms of the second contract, the co-operative society would be obliged to build elsewhere at a later date.

Their Lordships were not impressed with other arguments adduced by the appellants, and they rejected an application by the appellants to raise a further defence which had not been pleaded and had not been advanced before either the trial judge or the Court of Appeal. Their Lordships will advice His Majesty the Yang di-Pertuan Agong that this appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors: *Waterhouse & Co.; Philip Conway Thomas & Co.*